In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1942

No. 578

HELMS BAKERIES (a corporation),
Petitioner and Appellee Below,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,
Respondents and Appellants Below.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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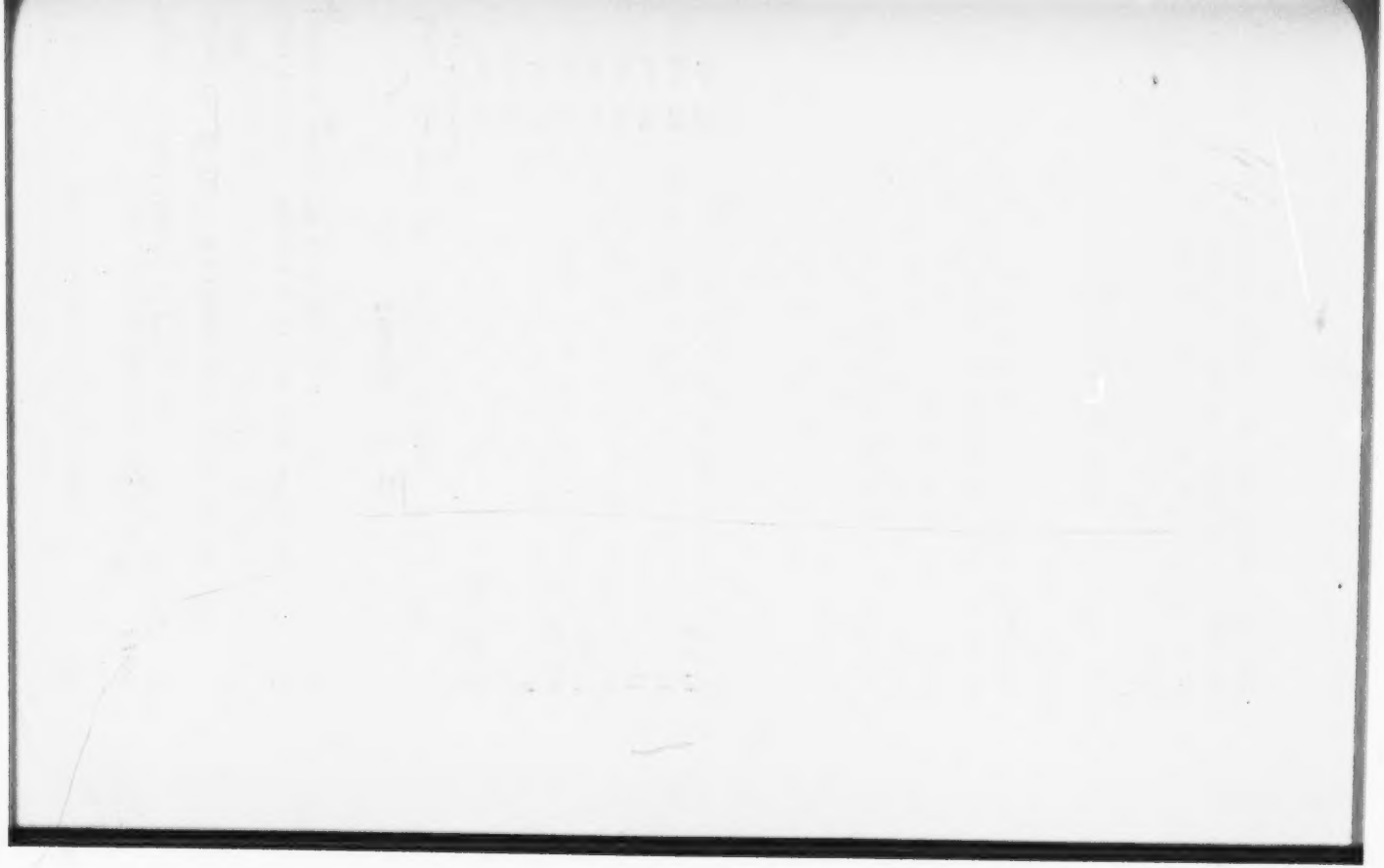

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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,
Respondents and Appellants Below.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioner has stated correctly on pages 4 to 6 of its petition the majority of the facts pertinent to its petition, but at page 4 there are certain serious inaccuracies. At page 4, petitioner states "Briefly, the

undisputed facts are: * * * It (petitioner) supplies more than 370 routemen with food products and other items for resale to consumers within the State of California." On the same page it states that "plaintiff, at wholesale, sold food products (during October 1, 1934, to June 30, 1935) to more than 200 routemen who resold such food products at retail to ultimate consumers, on the salesmen's own behalf and account". The statement that such alleged facts are undisputed is contrary to the record. The basis on which the additional assessment of tax was made by the State Board of Equalization was that petitioner was the retailer of its food products and that the routemen were employees of petitioner. (Tr. p. 53.) If the facts had been as stated by petitioner an additional assessment would never have been levied against it and this litigation would never have been instituted.

SUMMARY OF ARGUMENT.

Respondents' argument will be divided into two parts, the first part dealing with the question of jurisdiction, and the second part devoted to answering the contentions of petitioner.

It is respondents' belief that the petition is without standing in this court by reason of the lack of a final judgment in the courts of California.

However, if this court disagrees with our contention on the question of jurisdiction, respondents believe that the petition should be denied for there is no showing of any error by the District Court of Appeal of

the State of California. Respondents will show that the denial of the remedy of injunction was proper and that petitioner was accorded all of the notice and hearing required by the due process clause of the Federal Constitution.

ARGUMENT.

I. THERE IS NOT A FINAL JUDGMENT IN THIS ACTION AND THE PETITION IS PREMATURE.

This court does not have jurisdiction to review other than final judgments or decrees on certiorari to a state court. In the instant cause, a judgment granting a permanent injunction was rendered by a trial court and appeal therefrom taken to the Supreme Court of California which court, pursuant to authority, transferred the cause to the District Court of Appeal. The District Court of Appeal reversed the decision of the trial court, the order in the judgment being "The judgment is reversed". (Tr. p. 85.)

Under the law of the State of California, a reversal of a cause by an appellate court does not result in a final determination of that cause.

Atchison, Topeka & Santa Fe Railway Company v. Superior Court, 12 Cal. (2d) 549;
Monson v. Fischer, 219 Cal. 290;
Central Savings Bank v. Lake, 201 Cal. 438.

In the last cited case, the Supreme Court of California said at page 443:

> "It has long been the law in this state that an unqualified reversal remands the cause for a new

> trial, (Falkner v. Hendy, 107 Cal. 49, 54 (40 Pac. 21), and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable."

Thus the judgment of the District Court of Appeal does not meet the test laid down by this court to wit: that the judgment "must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance the court below would have nothing to do but to execute the judgment or decree it had already entered".

Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432, 437.

This court has held that a reversal by an appellate court of a trial court's decree granting a permanent injunction and remanding to the lower court for further proceedings is not a final judgment.

Pepper v. Dunlap, 18 How. 86, 15 L.Ed. 272.

II. THE JUDGMENT OF THE DISTRICT COURT OF APPEAL THAT PETITIONER DID NOT SHOW IRREPARABLE INJURY IS ADEQUATELY SUPPORTED BY THE RECORD.

The judgment of the District Court of Appeal was based on two grounds either of which would have been adequate to support the judgment. The first was that the granting of an injunction was not proper because the petitioner had a plain, speedy and adequate remedy at law. The second was that the injunction was

not proper because there was no showing of irreparable injury. The court dismissed as untenable the argument of petitioner that the threatened action would deprive petitioner of a property right or privilege without due process of law. (Tr. p. 85.)

It is clear that under the decisions of this court and those of the Supreme Court of California proof of irreparable injury is essential to the granting of an injunction.

Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65;
Boise Artisian Water Co. v. Boise City, 213 U. S. 276;
Petroleum Exploration, Inc. v. Public Service Comm., 304 U. S. 209, 218;
California v. Latimer, 305 U. S. 255, 261;
E. H. Renzel Co. v. Warehousemen's Union, 16 Cal. (2d) 369, 373.

The only evidence before the trial court which could have the slightest bearing on the question of irreparable injury was the simple statement of the president of petitioner that the sale of flour sacks and barrels (comprising less than three-tenths of one per cent of its sales and purely residual to its business, to wit, the sale of bread and other bakery products) was in his opinion a necessary part of the business. (Tr. p. 36.) The District Court of Appeal determined that no showing of irreparable injury has been made. This determination, which is clearly justified by the record, is sufficient to sustain the judgment and this court should not grant the petition.

III. PETITIONER HAD A PLAIN, SPEEDY, AND ADEQUATE REMEDY AT LAW.

The action in the Superior Court of the State of California was initiated for the purpose of enjoining the threatened revocation by the California Board of Equalization of a retailer's permit held by the petitioner. The record is clear that the only reason for this threatened revocation was the failure of petitioner to pay a certain assessment of additional tax under the Retail Sales Tax Act. (Tr. p. 6.) There is no question but that payment of the tax would have prevented the revocation and the threat of revocation was conditioned on that premise. In the event such payment had been made within the period provided by law the statute (Retail Sales Tax Act, Cal. Stats. 1933, p. 2599 as amended, (sec. 23))[1] provided that a claim for refund should be filed within six months after the date the assessments under Sections 17 or 18 become final and suit commenced within ninety days after the denial of such claim. (Sec. 31.) A judgment in such suit carries interest at the rate of six percent per annum from the date of payment of the tax. This remedy has been held adequate so as to preclude the issuance of an injunction by the federal courts.

Corbett, et al. v. Printers and Publishers, 127 Fed. (2d) 195;

Cf. *Nevada-California Electric Corp. v. Corbett,* 22 Fed. Supp. 951.

The petitioner in the instant case was mailed notice of denial of its petition for reassessment on December

[1]Sections 16, 17, 20, 23 and 31, of the Retail Sales Tax Act as they provided on July 1, 1939, are set forth in Appendix A.

8, 1939, and under section 20 the assessment became final on January 7, 1940. Thus a payment could have been made and claim for refund filed on or before July 6, 1940, which was fifteen days after the complaint for an injunction was filed and forty-five days subsequent to the notice of hearing on the question of revocation. (Tr. p. 6.) Therefore, at the time of the threatened revocation, the petitioner had a plain, speedy and adequate remedy at law and by adopting the statutory procedure could have avoided any question of forfeiture of its permit.

Matthews v. Rodgers, 284 U. S. 521.

Petitioner, at pages 34 to 36 of its petition and brief contends that at the time the additional assessment of tax was levied the time to file suit for refund had already elapsed and therefore the remedy provided was not adequate. As illustrative of its position, petitioner cites a portion of section 31 of the Retail Sales Tax Act. This cited language was amended effective July 1, 1939, so that the provision relative to suit thereafter read that suit must be begun within ninety days after rejection of a claim for refund. Petitioner refers to the section prior to amendment when it allowed sixty days after the tax was due and payable within which to file a suit for refund, and under section 20 of the Act the tax herein question was due and payable on January 6, 1940.[2] In any event, section 31 as it read both before and after amendment did not operate as a bar to payment by

[2]Section 31 of the Retail Sales Tax Act as it read prior to amendment in 1939 is set forth in Appendix B.

petitioner and suit for refund after the additional assessment had been made.

Section 20 provides in part:

> "Any retailer against whom an assessment is made by the board under the provisions of Section 17 or 18 hereof may petition for a reassessment thereof within 30 days after service upon the retailer of notice thereof. If a petition for reassessment is not filed within said 30-day period the amount of the assessment becomes final at the expiration thereof. * * *
>
> The order or decision of the board upon a petition for reassessment shall become final 30 days after service upon the retailer of notice thereof.
>
> "All assessments made by the board under the provisions of Section 17 or 18 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of 10 per cent of the amount of the tax. * * *"

The Supreme Court of California has recently held that a tax levied under section 17 of the Act is not delinquent until it is due and payable as provided in section 20.

People v. Hochwender, 20 Cal. (2d) 181.

This decision respondents believe completely disposes of petitioner's contention that at the time the additional assessment became final petitioner was barred from commencing a suit for refund and its contention that respondent is barred from commencing an action to collect the tax due by reason of the additional assessment.

If, by reason of failure to follow the administrative remedies, petitioner is barred from recovery of the amount assessed that neglect on the part of the taxpayer does not render the remedy any the less plain, speedy and adequate and the petitioner is barred from injunctive relief.

Phipps v. School District of Pittsburgh, 111 Fed. (2d) 393;

Moulton v. Knapp, 85 Cal. 385.

IV. THE BOARD OF EQUALIZATION FOLLOWED THE PROPER STATUTORY PROCEDURE FOR REVOCATION.

Petitioner attacks the procedure of the Board of Equalization relative to the threatened revocation of the retailer's permit presumably on the ground that under the statute an adjudication in court that the permittee has been guilty of violation of the rules and regulations of the Board of Equalization must be had before the Board can issue its order to show cause why the permit should not be revoked. This contention is obviously absurd. Petitioner as evidenced by its citation of *Laisne v. California State Board of Optometry,* 19 Cal. (2d) 831, has confused the right of an administrative Board to revoke a license with the right of the licensee to a review of the order of revocation by a court. The interpretation placed by petitioner upon Section 16 of the Retail Sales Tax Act would render it an absolute nullity. The question of determination of the existence of a violation should be for the administrative board in the first instance.

City of Chicago v. Kirkland, 79 Fed. (2d) 963.

The contention urged by petitioner would result in absurd situations making impossible a revocation of a retailer's license by the State Board of Equalization. Although a judicial determination of the validity of an assessment of tax could be had prior to a revocation of the license by the Board of Equalization there are many cases of violation of the rules and regulations where the only judicial determination possible would be in a court proceeding for revocation. The legislature did not provide for a court proceeding for revocation but rather an administrative proceeding. If an administrative board had to wait in each case for a judicial determination of violation the whole theory upon which Section 16 is based would fall for there would be no speedy and efficient method to insure observance of the promulgated rules and regulations and the use of revocation as a means of collection of tax would be worthless.

V. THE TRIAL COURT FINDINGS ARE INEFFECTIVE.

Petitioner has throughout its petition and the supporting brief urged that the findings of the trial court compel certain conclusions, as to the rights of petitioner, by this court. In this regard, respondents desire to call to the attention of the court the inaccurate statements by petitioner that the findings were undisputed. This is inaccurate for appeal was taken from the whole judgment and under California law such an appeal entitles the appealing party to question all of the findings of the trial court. Respondents, in the opening brief in the California District Court of Ap-

peal, attacked each of the findings to which petitioner refers.

Cortelyou v. Imperial Land Co., 166 Cal. 14.

In so far as the argument of petitioner relative to the failure of the District Court of Appeal to overturn the findings is concerned, it is clear that the judgment of the appellate court does not consider them for the reason that it determined that the trial court did not have jurisdiction to grant an injunction thus making any question of the validity of or liability for the tax immaterial. The trial court has thus been held not to have jurisdiction to pass upon the question of liability for the tax and any findings it made upon this question were void.

VI. THE PROVISION FOR COLLECTION OF TAXES BY SUIT IN THE RETAIL SALES TAX ACT DOES NOT RESTRICT THE STATE TO THE USE OF THAT METHOD.

Petitioner urges that as Section 30 provides for collection by suit that remedy is the sole method of collection. Petitioner ignores, however, the fact that Section 26 provides several other methods of collection, such as writ of execution issued upon an administrative "judgment", warrant of distraint and seizure and sale. Section 26 further specifically states:

> "It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any

remedy hereunder to the exclusion of any other remedy for which provision is made in this act."

Thus, the argument advanced by petitioner has no pertinence in view of the provisions of the statute.

VII. SECTION 16 IS NOT UNCONSTITUTIONAL.

Petitioner contends that Section 16 of the Act is violative of the United States and California constitutions if it allows the Board of Equalization to determine liability for taxes and upon failure to pay to revoke the permit of the delinquent taxpayer. Petitioner cites *Laisne v. California State Board of Optometry,* 19 Cal. (2d) 831, in support of this position. The *Laisne* case offers no aid to petitioner for it did not state that the violation must be judicially determined prior to revocation but simply said that *after* a revocation of a license the licensee was entitled to a judicial trial de novo to determine the correctness of the order of revocation. In addition, the case did not involve a taxing statute which is of great importance in view of the consistent view of the courts that in most instances taxes should be paid prior to any questioning by legal action.

Dows v. Chicago, 11 Wall. 108;
Shelton v. Platt, 139 U.S. 591;
Dodge v. Osborn, 240 U.S. 118.

The Retail Sales Tax Act provides the liability of the taxpayer and its method of determination. That liability can be questioned by the taxpayer in the

method provided by the statute but unless the proper remedies are followed the liability is final without judicial determination.

People v. Richardson, 37 Cal. App. (2d) 275;
People v. Mahoney, 13 Cal. (2d) 729, 735;
Retail Sales Tax Act, sections 23, 31.

In the instant cause, petitioner had notice of the assessment of the tax and a hearing thereon, it had notice of the intention to revoke its license for non-payment of the tax and a hearing on that question. It could have followed the procedure provided in the statute and avoided the threat of revocation. It refused to do this and now contends that the burden was on the Board of Equalization to establish the tax liability by judicial process before it could act under Section 16. Such a proceeding is unheard of in any system of taxation, federal or state, and would be contrary to the whole principle of tax law.

Petitioner places some reliance on *Fidelity & Deposit Co. v. Tafoya,* 270 U. S. 434. It is difficult to see the pertinence of that case for it involved the effort of New Mexico to restrain the acts of a foreign corporation done outside New Mexico by revoking its permit to do business in New Mexico. In the instant cause there is no effort at extraterritorial results or illegal results and petitioner is a California corporation. Respondents are seeking only to restrain the doing of specified acts in California by a California corporation by reason of its failure to pay taxes imposed by the laws of California. There is no scheme to accomplish a forbidden result such as was referred

to in the *Tafoya* case. The Board of Equalization is simply seeking to enforce a method used for collection of a tax, a procedure which respondents submit is clearly proper.

Osborn v. Ozlin, 310 U.S. 53;

J. C. Penney Co. v. Wisconsin Tax Comm., 311 U.S. 435;

Kansas City, Memphis & Birmingham Rd. Co. v. Stiles, 242 U.S. 111, 118;

Sears Roebuck v. Roddewig, 24 Fed. Supp. 321.

CONCLUSION.

We urge that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
January 11, 1943.

Respectfully submitted,

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(Appendices A and B Follow.)